

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

June 21, 2019

The Honorable Kaye Smythe
Panola County Election Commissioner
Post Office Box 346
Batesville, Mississippi 38606-0346

Re: Separation of Democratic and Republican scanned and collected ballots in
DS 200 voting machines

Dear Ms. Smythe:

Attorney General Jim Hood received your letter of request and assigned it to me for
research and reply.

Background

Panola County has purchased DS 200 Precinct Scanners and will be using them for the
first time in the August 2019 primary elections.

It is our understanding that these voting machines comply with all the requirements of
Optical Mark Reading (OMR) equipment set forth in Section 23-15-507 of the
Mississippi Code including the requirement that the scanners permit eligible voters to
vote for all persons for whom they are lawfully entitled to vote. Therefore, in the August
primaries, voters will be able to choose whether they want to vote in the Democratic or
Republican primary and will then be allowed to vote only for the candidates in the
chosen primary.

It is our further understanding that the DS 200 machines will scan and accurately record
the votes cast in each primary and print out the results of the voting for each primary in
each precinct.

The DS 200 machines will deposit the voted ballots for both primaries in the same
secure ballot bin.

The Panola County Election Commission has entered a contract with the Panola County
Republican Executive Committee to perform the duties on behalf of the executive
committee as authorized by Section 23-15-266.

The Panola County Election Commission has been negotiating with the Panola County Democratic Executive Committee to also perform those duties on behalf of that executive committee. However, the Democratic Executive Committee insists that, upon the close of the polls on election night, the seals on the secure bin of each DS 200 machine be removed, the bin opened, the ballots separated by party and stored and secured in each party's own ballot boxes pending any potential post-election challenges. The Republican Executive Committee strongly objects to this procedure arguing that the voted ballots should not be handled after the voting has been completed and ballots counted unless and until valid post election challenges have been initiated.

Questions Presented

Is there a requirement that party ballots be separated at the end of primary election night?

Since the parties disagree on what should happen to the ballots on election night, what is the election commission's role in this matter?

Response

OFFICIAL OPINION
We find no requirement that party ballots be separated after the polls close on election night.

If the Election Commission and Democratic Executive Committee do not resolve the matter and enter into a contract pursuant to Section 23-15-266, the Democratic Executive Committee will have to conduct its own primary. The Election Commission would only conduct the republican primary in accordance with the executed contract.

If the matter is not resolved and the Democratic Executive Committee conducts the democratic primary, it would not have the authority to access the scanned and counted ballots after the voting has concluded and the polls closed for the purpose of separating the ballots by party.

Analysis

The Panola County Board of Supervisors, pursuant to Section 23-15-391, chose to purchase and utilize OMR equipment, specifically the DS 200 machines which have the capability to scan, count and record the votes of separate and distinct elections simultaneously which, in the instant case, would be the Democratic and Republican primaries to be conducted on August 6, 2019. We find no legal authority for an executive committee of one party to have access to the secured ballot bin containing not only the ballots of its primary but also the ballots voted in another party's primary.

To have ballots exposed to handling by a party's poll workers, members of an executive committee or anyone else would create an unacceptable and unnecessary opportunity for tampering with ballots from both party primaries. After voting is complete and the

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polls are closed, it is imperative that the voted ballots be secured and preserved without any opportunity for anyone to have access to them unless and until a post-election challenge is initiated as provided by law. If a candidate believes that the ballots in his or her primary were incorrectly counted by the OMR equipment, there are legal remedies available that allow candidates to verify that the results of a primary election were accurately certified.

Section 23-15-911 allows candidates to physically examine and hand-count the ballots in the presence of the circuit clerk to ensure the accuracy of the certified results. In that examination, the ballots of the two primaries would have to be separated by the appropriate election officials representing each political party to preserve the security and integrity of the ballots. Pursuant to Section 23-15-515, county circuit clerks are the custodians of OMR equipment. Therefore, any separation of primary ballots must be done in the presence and supervision of the appropriate circuit clerk.

Sections 23-15-921 through 23-15-941 set forth procedures for formally contesting the certified election results through the appropriate party executive committee and circuit court.

If a contest is filed with the appropriate executive committee pursuant to Sections 23-15-921 through 23-15-925 and the ballots were not separated for a box examination pursuant to Section 23-15-911, the same procedure to separate the ballots as described above would be applicable.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Phil Carter
Special Assistant Attorney General